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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

ROBIN MOODY, on behalf of herself and all  
others similarly situated,

Plaintiff,

vs.

CITIBANK, N.A.,

Defendant.

Case No. 3:18-cv-04496-JD

**DEFENDANT CITIBANK, N.A.'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT, AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: Thursday, March 21, 2019

Time: 10 a.m.

Location: Courtroom 11, 19th Floor

Judge: The Honorable James Donato

# TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION TO DISMISS .....	1
STATEMENT OF THE ISSUE TO BE DECIDED .....	1
INTRODUCTION .....	1
BACKGROUND .....	2
LEGAL STANDARD .....	5
ARGUMENT .....	5
I. This Action Should Be Dismissed Because Plaintiff Does Not And Cannot Allege That Citibank Breached Any Duty Owed Under California Civil Code § 2954.8(a) ....	6
II. Citibank Reserves Its Right To Argue Federal Preemption.....	11
CONCLUSION .....	12

**TABLE OF AUTHORITIES****Page(s)****Cases**

<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	5
<i>Bass v. Cty. of Butte</i> , 458 F.3d 978 (9th Cir. 2006) .....	7
<i>Beck Park Apartments v. U.S. Dep't of Hous. &amp; Urban Dev.</i> , 695 F.2d 366 (9th Cir. 1982) .....	5
<i>In re Capacitors Antitrust Litig.</i> , 106 F. Supp. 3d 1051 (N.D. Cal. 2015) .....	5
<i>Christina Trust v. Riddle</i> , 911 F.3d 799 (5th Cir. 2018) .....	10
<i>Dairy v. Bonham</i> , 2013 WL 3829268 (N.D. Cal. 2013) .....	8
<i>Droeger v. Friedman, Sloan &amp; Ross</i> , 54 Cal.3d 26 (1991) .....	7
<i>Enter. Leasing Corp. v. Shugart Corp.</i> , 231 Cal. App. 3d 737 (1991) .....	10
<i>In re Gilead Scis. Sec. Litig.</i> , 536 F.3d 1049 (9th Cir. 2008) .....	5, 9
<i>Green v. Cent. Mortg. Co.</i> , 148 F. Supp. 3d 852 (N.D. Cal. 2015) .....	10
<i>Hawk v. Carrington Mortg. Servs., LLC</i> , 2016 WL 4414844 (M.D. Pa. 2016) .....	10
<i>Johnson v. Federal Home Loan Mortgage Corp.</i> , 793 F.3d 1005 (9th Cir. 2015) .....	9, 10
<i>Kievman v. Fed. Nat'l Mortg. Ass'n</i> , 901 F. Supp. 2d 1348 (S.D. Fla. 2012) .....	10
<i>Lennard v. Yeung</i> , 2012 WL 13006214 (C.D. Cal. 2012) .....	9
<i>Lewis v. Boehm</i> , 947 F.2d 1265 (Wash. Ct. App. 1997) .....	10

1	<i>Lusnak v. Bank of America, N.A.</i> ,	
2	883 F.3d 1185 (9th Cir. 2018).....	2, 11
3	<i>Rosell v. Wells Fargo Bank, N.A.</i> ,	
4	2014 WL 4063050 (N.D. Cal. 2014).....	3
5	<i>Wilcox v. Birtwhistle</i> ,	
6	21 Cal. 4th 973 (1999) .....	8
7	<b>Statutes, Regulations, and Rules</b>	
8	15 U.S.C. § 1639d.....	5
9	Cal. Fin. Code § 50003 .....	7
10	Cal. Fin. Code § 50202 .....	7
11	Cal. Civil Code § 2954.8.....	<i>passim</i>
12	Fed. R. Civ. P. 12(b)(6).....	1, 5
13	<b>Other Authorities</b>	
14	<i>Core Legislative History of California Statutes of 1976, Chapter 25, Assembly Bill</i>	
15	484—Pappan.....	7, 8
16	Consumer Financial Protection Bureau, <i>What’s the difference between a mortgage</i>	
17	<i>lender and a servicer?</i> (Sept. 13, 2017), <a href="http://www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/">www.consumerfinance.gov/ask-</a>	
18	<a href="http://www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/">cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/</a> .....	7
19	HUD Handbook 4330.1, Rev-5, § 2-5(C),	
20	<a href="https://www.hud.gov/sites/documents/43301C2HSGH.PDF">https://www.hud.gov/sites/documents/43301C2HSGH.PDF</a> .....	5

**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on Thursday, March 21, 2019, at 10 a.m., or as soon thereafter as the matter may be heard before the Honorable James Donato in the United States District Court for the Northern District of California, Courtroom 11, located on the 19th Floor of the United States Courthouse at 450 Golden Gate Avenue, San Francisco, California, Defendant Citibank, N.A. (“Citibank”) will and hereby does move to dismiss this action with prejudice under Federal Rule of Civil Procedure 12(b)(6), on the ground that Plaintiff’s First Amended Class Action Complaint fails to state a claim for which relief may be granted. This motion is based on this notice of motion and motion, the following memorandum of points and authorities, the pleadings, exhibits attached to Citibank’s concurrently filed request for judicial notice and Citibank’s previously filed request for judicial notice, and oral argument of counsel at the time of the hearing.

**STATEMENT OF THE ISSUE TO BE DECIDED**

Whether this action against Citibank should be dismissed for failure to state a claim under California Civil Code § 2954.8(a), where § 2954.8(a) requires certain financial institutions that receive advance escrow payments from mortgage borrowers to pay interest on them, but Citibank acquired Plaintiff’s mortgage without taking over the mortgage servicing rights and thus neither receives Plaintiff’s escrow payments nor controls the mortgage servicer that does receive them.

**INTRODUCTION**

In this putative class action, Plaintiff Robin Moody alleges that Citibank violated California Civil Code § 2954.8(a) because she has not received interest on the advance escrow payments that she is required to make to her mortgage servicer under the terms of her mortgage. She obtained that mortgage in 2006 from Countrywide Home Loans, Inc. (“Countrywide”), not Citibank. Although Citibank (in its capacity as an investor) acquired the mortgage in 2016, Citibank did not take over the mortgage servicing rights: indeed, Plaintiff does not and cannot allege that either Citibank or any Citibank affiliate has ever serviced Plaintiff’s escrow account. Nonetheless, Plaintiff has sued Citibank—rather than the servicer of her mortgage—seeking disgorgement of profits that Citibank never received, as well as an order enjoining Citibank from supposedly unlawful servicing activities that Citibank was never responsible for. Moreover, Plaintiff would be a member of a putative class

1 action that is already proceeding in another California federal court against Plaintiff's mortgage  
2 servicer for failure to pay escrow interest (*Lusnak v. Bank of Am., N.A.*, No. No. 2:14-cv-01855  
3 (C.D. Cal.)): it makes little sense that Plaintiff should be allowed to seek wholly duplicative relief  
4 against Citibank in this case when it is the defendant in that action that would have both received  
5 the alleged profits she seeks to disgorge and been directly responsible for the purported conduct  
6 she seeks to enjoin.

7 Plaintiff's recent amendments to her complaint do not cure the fundamental deficiency  
8 Citibank identified in its previously filed motion to dismiss: because Citibank is simply the investor  
9 in Plaintiff's mortgage, it cannot be the entity required to pay escrow interest under § 2954.8(a).  
10 By its plain terms, § 2954.8(a) requires the financial institution that "receives" the borrower's  
11 escrow deposits to pay interest on them. That is not Citibank. Plaintiff's amended complaint  
12 provides no factual support for the conclusory allegation that Citibank receives Plaintiff's escrow  
13 deposits. Nor does it provide factual support for the allegation that Citibank controls the servicer  
14 that *does* receive those deposits. In fact, those allegations are contradicted by Plaintiff's mortgage,  
15 which provides that if the mortgage is sold, the purchaser does not assume the servicing rights.  
16 Plaintiff thus cannot state a claim for violation of § 2954.8(a) against Citibank, and therefore, this  
17 action should be dismissed with prejudice.

18 Citibank continues to maintain that § 2958(a)—as applied to a national bank such as  
19 Citibank—is preempted by federal law, as the Office of the Comptroller of the Currency ("OCC")  
20 determined through properly adopted regulations that have the force of law. *See* Dkt. 13; Dkt 24.  
21 The Ninth Circuit however has ruled that the National Bank Act does not preempt California Civil  
22 Code § 2958(a). *See Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018). Citibank  
23 believes *Lusnak* was wrongly decided, but recognizes that this Court is bound by the Ninth Circuit's  
24 preemption determination unless and until the Ninth Circuit revisits it or the Supreme Court  
25 abrogates it. Plaintiff's claims still warrant dismissal because California law does not require  
26 Citibank to pay escrow interest in the circumstances here.

## 27 BACKGROUND

28 Plaintiff filed this putative class action against Citibank on July 25, 2018, seeking

1 disgorgement and injunctive relief under California’s Unfair Competition Law (“UCL”) based on  
 2 Citibank’s alleged noncompliance with § 2954.8(a), and seeking damages for breach of contract  
 3 under a provision of Plaintiff’s mortgage that allegedly incorporates § 2954.8(a). Dkt. 1, ¶¶ 23–33  
 4 & p. 10. Citibank moved to dismiss for failure to state a claim on the ground that § 2954.8(a) is  
 5 inapplicable to Citibank in the circumstances of this case. Dkt. 13. The Court had not yet ruled on  
 6 the motion by the time of the January 24, 2019 case management conference, when the Court *sua*  
 7 *sponte* dismissed Plaintiff’s complaint without prejudice for failure to plead subject-matter  
 8 jurisdiction. Dkt. 39. Plaintiff thereafter filed an “Amended Complaint” (Dkt. 40) which, in addition  
 9 to making new jurisdictional allegations (*id.*, ¶¶ 13–14), also makes new allegations directed to the  
 10 merits of Plaintiff’s claims against Citibank. *E.g., id.* ¶¶ 7–8. The new complaint, however, still  
 11 offers few concrete details about Plaintiff’s mortgage and escrow account.

12 Plaintiff alleges that she entered an agreement with Countrywide in 2006 for a mortgage on  
 13 a residential property in Alameda County. Dkt. 40, ¶ 5. The Deed of Trust (“Ex. A”) was attached  
 14 as Exhibit A to Citibank’s Oct. 9, 2018 request for judicial notice (Dkt. 14) which is still pending  
 15 before the Court.<sup>1</sup> Along with principal and interest payments, the Deed of Trust requires that the  
 16 “Borrower” periodically “shall pay” to the “Lender” “funds for Escrow Items,” including “taxes  
 17 and assessments” and “premiums for any and all insurance required by Lender.” Ex. A at 4, 5. The  
 18 Deed of Trust defines the “Lender” as Countrywide. *Id.* at 2. The Deed of Trust also provides that  
 19 “Lender shall not be required to pay Borrower any interest or earnings on the [escrow] Funds,”  
 20 “[u]nless an agreement is made in writing or Applicable Law requires interest to be paid on the  
 21 Funds.” *Id.* at 5. In 2016, Plaintiff alleges that the Deed of Trust was assigned to Citibank. Dkt. 40,  
 22 ¶ 5. The Assignment of Deed of Trust (“Ex. B”) was Exhibit B to Citibank’s Oct. 9, 2018 request  
 23 for judicial notice.<sup>1</sup>

24 Plaintiff alleges that she “has timely deposited funds into the escrow accounts” “[a]s

25 <sup>1</sup> Exhibits A and B to Citibank’s prior request for judicial notice are Alameda County public records  
 26 constituting “evidence which a court may properly consider on a motion to dismiss” because they  
 27 are “evidence subject to judicial notice under Federal Rule of Evidence 201” as well as “documents  
 28 whose contents are alleged in a complaint and whose authenticity no party questions, but which are  
 not physically attached to the pleading.” *Rosell v. Wells Fargo Bank, N.A.*, 2014 WL 4063050, at  
 \*3 (N.D. Cal. 2014).

1 required by the ... Mortgage Agreement,” but “has never received back from *Defendant or its*  
 2 *agents or loan servicers* the interest owing on her funds.” Dkt. 40, ¶ 7 (emphasis added). The  
 3 amended complaint fails, again, to identify the mortgage servicer that collects Plaintiff’s escrow  
 4 payments. Plaintiff does not—and cannot—allege that either Citibank or any corporate affiliate of  
 5 Citibank ever serviced Plaintiff’s mortgage or escrow account.<sup>2</sup> To the contrary, Section 20 of the  
 6 Deed of Trust says that “[i]f the Note is sold and thereafter the Loan is serviced by a Loan Servicer  
 7 other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will  
 8 remain with the Loan Servicer ... and are not assumed by the Note purchaser.” Ex. A at 12.

9 Nevertheless, Plaintiff’s amended complaint now alleges that “Defendant received [escrow]  
 10 funds from Moody either directly or indirectly through Defendant’s agent or loan servicer whom  
 11 Defendant authorized to receive the funds and whom Defendant controls.” Dkt. 40, ¶ 7. The  
 12 complaint also now alleges that “Defendant controlled and controls whether it, its agents, or its loan  
 13 servicers authorized to receive the funds complied with and comply with applicable law, including  
 14 the requirement to pay interest in accordance with California Civil Code § 2954.8(a).” *Id.* ¶ 8. The  
 15 complaint pleads *no* concrete facts to support those new and wholly conclusory allegations.  
 16 Accordingly, Plaintiff has pleaded no facts to show that Citibank is required to pay escrow interest  
 17 under Civil Code § 2954.8(a), which applies only to the financial institution that “*receives* money  
 18 in advance for ... purposes relating to the property” (emphasis added). *See infra* at 5–11.

19 Yet Plaintiff seeks to represent a putative class of “mortgage loan customers of Citi (or its  
 20 subsidiaries)” “to whom Citi and its agents and loan servicers failed to pay interest as required by  
 21 § 2954.8(a).” Dkt. 40, ¶ 19. Given that Plaintiff’s own complaint cites to and relies upon *Lusnak*,  
 22 Plaintiff is obviously aware that her own mortgage servicer, Bank of America, has already been  
 23 sued in another California federal court on behalf of a putative class of “[a]ll mortgage loan  
 24 customers of Bank of America (or its subsidiaries)” who “did not receive interest on the amount  
 25 held by Bank of America” in escrow. *Lusnak v. Bank of Am., N.A.*, No. 2:14-cv-01855, Dkt. 1,  
 26 ¶ 17 (C.D. Cal. Mar. 12, 2014). Even though Plaintiff’s claims would be represented in that action

27 <sup>2</sup> Rather, and as plaintiff’s counsel confirmed during the parties’ Rule 26(f) conference, Citibank  
 28 understands that Bank of America, N.A. (“Bank of America”)—Countrywide’s successor—has  
 remained Plaintiff’s mortgage servicer following the assignment to Citibank.

1 against her loan servicer (if it were certified as a class), Plaintiff apparently seeks to represent here  
 2 a broad class of other Citibank customers that encompasses even those whose loans—*unlike*  
 3 Plaintiff’s loan—were “originated” by Citibank. *Id.* ¶ 12 (“In 2016, Citibank, N.A. originated at  
 4 least 17,000 first loan mortgages.”).

### 5 LEGAL STANDARD

6 According to “[w]ell-established standards,” “to survive a Rule 12(b)(6) motion to dismiss,  
 7 a plaintiff must allege ‘enough facts to state a claim for relief that is plausible on its face.’” *In re*  
 8 *Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1060 (N.D. Cal. 2015) (quoting *Ashcroft v. Iqbal*,  
 9 556 U.S. 662, 678 (2009)). That requires “plead[ing] factual content [that] allows the court to draw  
 10 the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
 11 *Ashcroft*, 556 U.S. at 678). “[T]he Court need not ‘accept as true allegations that are merely  
 12 conclusory, unwarranted deductions of fact, or unreasonable inferences.’” *Id.* (quoting *In re Gilead*  
 13 *Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)).

### 14 ARGUMENT

15 All Plaintiff’s claims are based on the allegation that Citibank’s failure to pay Plaintiff  
 16 escrow interest violated California Civil Code § 2954.8(a). Although the amended complaint also  
 17 alleges that Citibank violated 15 U.S.C. § 1639d(g) and the terms of the Deed of Trust (Dkt. 40,  
 18 ¶¶ 28-29, 36), neither creates any independent legal requirement to pay escrow interest; at most  
 19 they require compliance with other applicable laws. *See* 15 U.S.C. § 1639d(g)(3) (“If prescribed by  
 20 applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held  
 21 in any impound, trust, or escrow account . . . in the manner as prescribed by that applicable State  
 22 or Federal law.”); Ex. A at 5 (“Unless . . . Applicable Law requires interest to be paid on the Funds,  
 23 Lender shall not be required to pay Borrower any interest or earnings on the Funds.”).<sup>3</sup> Because

24 <sup>3</sup> The Complaint also alleges Citibank “contravened the declared legislative policy espoused in the  
 25 HUD regulations as set forth in [the] HUD Handbook.” Dkt. 40, ¶¶ 28-29. The HUD Handbook is  
 26 “merely advisory” and does not support a cause of action. *Beck Park Apartments v. U.S. Dep’t of*  
 27 *Hous. & Urban Dev.*, 695 F.2d 366, 371 (9th Cir. 1982). Moreover, the Handbook says that  
 28 “[w]here escrow funds *are invested*, the net income derived from this investment must be passed  
 along to the mortgagor in the form of interest.” HUD Handbook 4330.1, Rev-5, § 2-5(C) (emphasis  
 added), <https://www.hud.gov/sites/documents/43301C2HSGH.PDF>. The amended complaint does  
 not allege that Plaintiff’s escrow funds were invested.

1 Plaintiff fails to plead factual content to show that Citibank plausibly may be liable to Plaintiff for  
 2 violating § 2954.8(a), the Court should dismiss this action with prejudice.

3 **I. This Action Should Be Dismissed Because Plaintiff Does Not And Cannot Allege**  
 4 **That Citibank Breached Any Duty Owed Under California Civil Code § 2954.8(a)**

5 Plaintiff does not state a viable claim under § 2954.8(a). Section 2954.8(a) states: “Every  
 6 financial institution that makes loans upon the security of real property containing only a one- to  
 7 four-family residence and located in this state or purchases obligations secured by such property  
 8 *and that receives* money in advance for payment of taxes and assessments on the property, for  
 9 insurance or for other purposes relating to the property, shall pay interest on the amount so held to  
 10 the borrower” (emphasis added). Because this statute only imposes a duty where a financial  
 11 institution “receives” escrow payments—a function typically played by the loan servicer—Plaintiff  
 12 fails to plausibly allege that Citibank violated it. While Plaintiff alleges that Citibank is the assignee  
 13 of her mortgage, Plaintiff does not and cannot allege that Citibank ever took over the servicing of  
 14 her mortgage and escrow account. Nor are any other concrete facts pleaded in the amended  
 15 complaint to show that Citibank *received* Plaintiff’s escrow payments.

16 The plain text of § 2954.8(a) imposes a duty to pay escrow interest to the borrower only on  
 17 financial institutions that meet *two* separate criteria: (1) they must either “make[] loans upon the  
 18 security of real property” or “purchase[] obligations secured by such property”; *and* (2) they must  
 19 “receive[]” advance payments of escrow funds. Here, the amended complaint alleges that Plaintiff’s  
 20 Deed of Trust was assigned to Citibank in 2016, indicating that Citibank “purchase[d]” the interest  
 21 in Plaintiff’s Deed of Trust from Countrywide. *See* Compl. ¶ 5; Ex. B. The amended complaint also  
 22 alleges that Plaintiff “deposited funds into the escrow accounts” required by the Deed of Trust.  
 23 Compl. ¶ 7. There is not, however, any concrete factual allegation indicating that Citibank ever  
 24 received those funds.

25 The use of the specific word “received” in § 2954.8(a) means that the second statutory  
 26 criterion cannot be pleaded simply through the allegation that Plaintiff made escrow payments on  
 27 a mortgage that is owned by Citibank. *Id.* Although no California court appears to have addressed  
 28 this issue, it is clear that a borrower’s escrow payments are typically collected or “received” by the

1 mortgage servicer—*i.e.*, the entity that handles the day-to-day management of the escrow  
 2 account—which, as here, is often not the mortgage holder.<sup>4</sup> *See* Cal. Fin. Code § 50003(x)  
 3 (“‘[s]ervice’ or ‘servicing’ means **receiving** . . . payments of principal, interest, or other *amounts*  
 4 *placed in escrow*, . . . and performing services . . . relating to that receipt”) (emphases added).

5 This is confirmed when § 2954.8(a) is construed—as it must be—together with other  
 6 California statutes on the subject of residential mortgage lending. *Compare Bass v. Cty. of Butte*,  
 7 458 F.3d 978, 981 (9th Cir. 2006) (“In interpreting a state statute, we must determine what meaning  
 8 the state’s highest court would give to the law.”), *with Droeger v. Friedman, Sloan & Ross*, 54  
 9 Cal.3d 26, 50 (1991) (“statutes in *pari materia*—that is, statutes relating to the same subject  
 10 matter—should be construed together”). Section 2954.8(a) is expressly incorporated in the  
 11 California Residential Mortgage Lending Act, Cal. Fin. Code § 50000 *et seq.* Specifically, Financial  
 12 Code § 50202(d) requires that “[a] borrower shall receive at least 2 percent simple interest per  
 13 annum on impound account payments covered by Section 2954.8 of the Civil Code.” But  
 14 § 50202(d) addresses the privileges of servicers that “receive[]” escrow funds from borrowers. *Id.*  
 15 (“benefits accruing from the placement in a non-interest-bearing account . . . of funds received by a  
 16 licensee who *services* mortgage loans . . . shall inure to the licensee”) (emphasis added). This shows  
 17 that the state-law duty to pay escrow interest—and the identical word “receive[]” in § 2954.8—  
 18 apply in the first instance to mortgage servicers.

19 The legislative history further confirms that it makes no sense to apply § 2954.8(a) to require  
 20 payment of escrow interest by a financial institution that has simply invested in a mortgage loan  
 21 without taking over the servicing rights. According to the Assembly policy committee analysis of  
 22 the bill that was enacted as § 2954.8(a) in 1976, “THE PROBLEM” that the Legislature intended  
 23 to address was a “question of equity”: “[M]ost financial institutions [did] not pay the borrower any  
 24 interest for the *use* of . . . impound funds,” and “many borrowers argue[d] that the *proceeds* from  
 25 the short-term loans [did] not rightfully belong to the lenders.” *Core Legislative History of*  
 26

27 <sup>4</sup> *See* Consumer Financial Protection Bureau, *What’s the difference between a mortgage lender and*  
 28 *a servicer?* (Sept. 13, 2017), [www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/](http://www.consumerfinance.gov/ask-cfpb/whats-the-difference-between-a-mortgage-lender-and-a-servicer-en-198/).

1 *California Statutes of 1976, Chapter 25, Assembly Bill 484—Pappan* (excerpts attached as exhibit  
 2 to concurrently filed Request For Judicial Notice) at Assembly Policy Committee Materials 39  
 3 (emphases added); *see id.* at Senate Policy Committee Materials 204 (same).<sup>5</sup> The Legislature  
 4 sought to redress this perceived lack of equity by requiring financial institutions that might benefit  
 5 from the *use* of escrow funds to provide borrowers with a return on their money in the form of a  
 6 fixed interest rate. As the Department of Savings and Loan stated in support of the bill, “as a matter  
 7 of justice and equity, a lending institution which receives money in advance . . . and has the use of  
 8 that money . . . should pay interest on these funds.” *Id.* at Enrolled (Governor) Materials, Page 29;  
 9 *see also id.* at Assembly Policy Committee Materials 36 (“[p]urpose” of A.B. 484 is  
 10 “[r]eimbursement to borrowers for interest on impound account monies currently being used by  
 11 financial institutions”); *id.* at 47 (“lenders bring to themselves the use of \$350,000,000 a year –  
 12 free”); *id.* at 96 (“Though these funds are held and used by the financial institution holding the  
 13 mortgage . . . , the bank or savings and loan presently pay no interest whatsoever on these funds....  
 14 [C]onsumers are entitled to a minimum portion of the earnings income.”); *id.* at 225 (“unacceptable  
 15 to allow lenders the use of approximately \$350,000,000 per year interest free”). The Legislature’s  
 16 purpose cannot be advanced by holding Citibank liable for unpaid escrow interest when Citibank  
 17 never had the use of Plaintiff’s escrow funds because it did not receive them. *See Wilcox v.*  
 18 *Birtwhistle*, 21 Cal. 4th 973, 977 (1999) (“[w]hen construing a statute, [a court] must ascertain the  
 19 intent of the Legislature so as to effectuate the purpose of the law,” “look[ing] to . . . the ostensible  
 20 objects to be achieved, the evils to be remedied, [and] legislative history”) (internal quotation marks  
 21 omitted). Thus, Plaintiff cannot plausibly claim that § 2954.8(a) requires Citibank to pay escrow  
 22 interest absent any meaningful allegation that Citibank actually receives and uses the escrow funds.

23 To be sure, the amended complaint now does allege, in thoroughly conclusory fashion, that  
 24 “Defendant received the [escrow] funds from Moody either directly or indirectly through  
 25 Defendant’s agent or loan servicer whom Defendant authorized to receive the funds and whom  
 26 Defendant controls.” Dkt. 40, ¶ 7. This unsupported allegation does not suffice to state a claim  
 27

28 <sup>5</sup> The court “may properly consider legislative history on a motion to dismiss.” *Dairy v. Bonham*,  
 2013 WL 3829268, at \*11 n.14 (N.D. Cal. 2013).

1 against Citibank and the Court need not accept it as true. *See In re Gilead Scis. Sec. Litig.*, 536 F.3d  
 2 at 1055 (the Court need not “accept as true allegations that are merely conclusory, unwarranted  
 3 deductions of fact, or unreasonable inferences.”). Certainly Plaintiff cannot plausibly allege that  
 4 Citibank “directly” received Plaintiff’s escrow payments where Plaintiff does not—because she  
 5 cannot—allege that Citibank is the mortgage servicer, and does not allege any other facts to indicate  
 6 that the payments were “directly” received by Citibank.

7       Rather, Plaintiff’s theory is clearly that Citibank “indirectly” received Plaintiff’s escrow  
 8 payments because the servicer received them as Citibank’s *agent*. However, “the existence of an  
 9 agency relationship is a factual matter,” and here too, Plaintiff “must plead facts indicating the  
 10 existence of such a relationship to survive a motion to dismiss.” *Lennard v. Yeung*, 2012 WL  
 11 13006214, at \*15 (C.D. Cal. 2012). Plaintiff has not done so. The only allegation supporting an  
 12 agency relationship is the conclusory statement that “Defendant controlled and controls whether it,  
 13 its agents, or its loan servicers ... complied with and comply with applicable law, including the  
 14 requirement to pay interest.” Dkt. 40, ¶ 8. This allegation is insufficient: Plaintiff does not even  
 15 identify the servicer, let alone plead specific facts about its relationship to Citibank to suggest that  
 16 Citibank controlled or authorized the servicer’s decision not to pay escrow interest.

17       Plaintiff cannot show that Citibank is vicariously liable for the servicer’s handling of her  
 18 escrow account simply by relying on the fact that the servicer receives principal and interest  
 19 payments on behalf of Citibank: In *Johnson v. Federal Home Loan Mortgage Corp.*, 793 F.3d 1005,  
 20 1006–07 (9th Cir. 2015), the Ninth Circuit addressed an analogous case where the plaintiff sued  
 21 the entity that purchased his mortgage based on allegations that the servicer—who retained the  
 22 servicing rights following the sale—had improperly administered the plaintiff’s escrow account by  
 23 failing to timely pay his insurance premium (thus triggering a series of events that led to the loss of  
 24 his home). But the Ninth Circuit affirmed dismissal, concluding that the mortgage holder was not  
 25 liable for the servicer’s conduct—even though the holder possessed “the right to receive the  
 26 payments on the note” and the servicer “service[d] mortgages for” the holder. *Id.* at 1008. Here,  
 27 too, Plaintiff has not pleaded sufficient facts to show that Citibank is vicariously liable for the  
 28

1 servicer's purportedly improper handling of Plaintiff's escrow account.<sup>6</sup>

2 Moreover: as in *Johnson*, the circumstances of this case simply do not permit Plaintiff to  
 3 rely on an agency theory to plead that Citibank "received" Plaintiff's escrow payments. Under the  
 4 express terms of the Plaintiff's Deed of Trust, Citibank's purchase of the mortgage did not result  
 5 in the assumption of any liability for the mortgage servicer. Section 20 of the Deed of Trust  
 6 expressly provides that "[i]f the Note is sold ..., the mortgage loan servicing obligations to  
 7 Borrower ... are not assumed by the Note purchaser unless otherwise provided by the Note  
 8 purchaser." Ex. A at 12 (emphasis added). The Ninth Circuit addressed precisely these contractual  
 9 terms in *Johnson*. See 793 F.3d at 1006 (quoting identical deed-of-trust provision). The Ninth  
 10 Circuit enforced the deed-of-trust provisions to affirm dismissal of the plaintiff's claims against the  
 11 mortgage holder. *Id.* at 1008–09. Rejecting the plaintiff's argument that the purchaser assumed the  
 12 seller's obligations under the mortgage, the court relied on the deed of trust to hold that the  
 13 "servicing obligations remained with [the seller]," and the purchaser "did not assume them." *Id.* at  
 14 1008.<sup>7</sup> Similarly, Citibank did not assume any liability for the servicing of Plaintiff's escrow  
 15 account simply because it acquired an interest in Plaintiff's mortgage.

16 Because Plaintiff does not and cannot allege that Citibank assumed any mortgage servicing

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 18 <sup>6</sup> Similarly, the Fifth Circuit recently affirmed dismissal of an action against a mortgage holder  
 19 based on the mortgage servicer's alleged violations of the Real Estate Settlement Procedures Act  
 20 ("RESPA"), on the grounds that (1) the borrower had not pleaded sufficient facts to establish an  
 21 agency relationship, and (2) the relevant provisions of RESPA did not make the mortgage holder  
 22 vicariously liable for the servicer. *Christiana Trust v. Riddle*, 911 F.3d 799, 803-06 (5th Cir. 2018);  
 23 see also *Hawk v. Carrington Mortg. Servs., LLC*, 2016 WL 4414844, at \*4 (M.D. Pa. 2016) (citing,  
 24 *inter alia*, *Green v. Cent. Mortg. Co.*, 148 F. Supp. 3d 852, 881 (N.D. Cal. 2015)) (under applicable  
 25 RESPA provision which "only governs loan servicers," the "majority position" is that "mortgage  
 26 holders . . . are not liable . . . for the alleged conduct of loan servicers"); *Kievmann v. Fed. Nat'l*  
 27 *Mortg. Ass'n*, 901 F. Supp. 2d 1348, 1352-53 (S.D. Fla. 2012) (lender was not liable for servicers'  
 28 violations of Truth in Lending Act).

29 <sup>7</sup> Although *Johnson* was decided under Washington law, California law is no different in any  
 30 relevant respect. Compare *Johnson*, 793 F.3d at 1008 (quoting *Lewis v. Boehm*, 947 F.2d 1265,  
 31 1270 (Wash. Ct. App. 1997)) ("under Washington law, 'an assignee in an executory contract is not  
 32 liable on the underlying obligations absent an express assumption of those obligations'"), with  
 33 *Enter. Leasing Corp. v. Shugart Corp.*, 231 Cal. App. 3d 737, 745 (1991) ("[T]he mere assignment  
 34 of rights under an executory contract does not cast upon the assignee the obligations imposed by  
 35 the contract upon the assignor.").

rights when it acquired her mortgage, this case starkly contrasts with *Lusnak*, where Bank of America both owned and serviced the plaintiff's mortgage. *See* Appellee's Response Brief 4, *Lusnak v. Bank of Am., N.A.*, Dkt. 16, No. 14-56755 (9th Cir.). Likely for that reason, the parties in *Lusnak* "agree[d] that the terms of Lusnak's mortgage require *Bank of America* to pay interest on escrow funds if required by federal law or state law that is not preempted." *Lusnak*, 883 F.3d at 1190 (emphasis added). Thus, *Lusnak* is distinguishable from this case, and in no way requires this Court to hold that Plaintiff has stated a claim against Citibank for violation of § 2954.8(a). The *Lusnak* panel just did not consider the application of § 2954.8(a) to the circumstances here.

Finally, Plaintiff's complaint fails because Plaintiff cannot demonstrate—as a practical matter—that an adequate remedy could even be obtained from Citibank. Plaintiff fails to allege that Citibank has access to any escrow funds from which to pay interest, much less that Citibank obtained any profits from those funds. Thus, the relief requested by Plaintiff—disgorgement of profits and cessation of the unlawful conduct—would not be available from Citibank. *See* Dkt. 40 at page 10. Such relief, if available at all, likely would lie with the servicer of Plaintiff's loan. Any adjudication of Plaintiff's claims against Citibank would be duplicative of, or possibly even inconsistent with, parallel claims that potentially could be asserted against the servicer. While the identity of Plaintiff's servicer is obviously readily available to Plaintiff, she has conveniently failed to allege that critical fact, suggesting that this action may be intended as a means for a second bite at the *Lusnak* apple.

For these reasons, even if Plaintiff were entitled to relief, her claims are misdirected: Plaintiff does not and cannot plead that Citibank either directly received Plaintiff's escrow funds or is vicariously liable for their receipt. Plaintiff thus fails to state any claim against Citibank for purported violations of § 2954.8(a). The Complaint should be dismissed with prejudice.

## **II. Citibank Reserves Its Right To Argue Federal Preemption**

Solely for the purpose of preserving the argument that Plaintiff's claims are preempted by federal law, Citibank also asserts that *Lusnak* was wrongly decided for the reasons discussed in its prior briefing (*see* Dkt. 13, Dkt. 24), and that this action warrants dismissal for failure to state a claim because the National Bank Act and 12 C.F.R. § 34.4 preempt Plaintiff's claims. In the event

1 that the Court does not dismiss this action at this time, but subsequently the Ninth Circuit  
2 disapproves *Lusnak* or the Supreme Court abrogates it, Citibank reserves the right to ask the Court  
3 to reconsider whether this action should be dismissed on preemption grounds.

4 **CONCLUSION**

5 For the foregoing reasons, this action should be dismissed with prejudice.

6  
7 Dated: February 8, 2019

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**CERTIFICATE OF SERVICE**

I, Debra Bogo-Ernst, hereby certify that on February 8, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: /s/ Debra Bogo-Ernst  
Debra Bogo-Ernst